

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS EDWARD TURNER,

Defendant-Appellant.

UNPUBLISHED

November 28, 2006

No. 263048

Wayne Circuit Court

LC No. 05-000533-01

Before: Cooper, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree murder, MCL 750.316; felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life in prison for the first-degree murder conviction, two to five years in prison for the felon in possession of a firearm conviction, and two years in prison for the felony-firearm conviction. We affirm.

Defendant's first argument on appeal is that the trial court's failure to instruct the jury regarding the lesser offense of voluntary manslaughter constitutes error requiring reversal. We disagree. Defendant waived this claim at trial. "A defendant may not waive objection to an issue before the trial court and then raise it as an error before this Court." *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998), citing *People v Simon*, 174 Mich App 649, 657; 436 NW2d 695 (1989). "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), quoting *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993). If a defendant waives his rights, rather than forfeits them, that waiver extinguishes any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

After closing arguments and jury instructions, the trial judge excused the jury and asked the parties if there were any objections to the jury instructions given or to the jury instructions requested but not given. Defense counsel objected only to the instruction regarding defendant's flight from the jurisdiction. The trial judge asked, "Anything else on the instructions?", and defense counsel replied, "Nothing from the Defense." This affirmation constitutes a waiver on the part of defendant regarding jury instructions, and therefore, precludes appellate review. In any case, as evidenced by the following discussion, the evidence would not have supported an instruction on voluntary manslaughter.

Defendant's second argument on appeal is that the evidence presented at trial was insufficient to convict defendant of first-degree premeditated murder. We disagree. A sufficiency of the evidence claim is reviewed de novo to determine whether a rational factfinder could have concluded that the prosecution proved all elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992); *People v McGhee*, 268 Mich App 600, 612; 709 NW2d 595 (2005). Direct and circumstantial evidence is viewed in the light most favorable to the prosecution. *People v Hardiman*, 466 Mich 417, 429; 646 NW2d 158 (2002). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *Id.*, p 429.

To convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and premeditated and deliberated the killing. *People v Mette*, 243 Mich App 318, 330; 621 NW2d 713 (2000); MCL 750.316. To establish premeditation and deliberation, there must have been sufficient time for the defendant to take a second look, and this may be inferred from the circumstances. *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). "The length of time necessary to 'measure and evaluate a choice before it is made is incapable of precise determination'; all that is necessary is enough time to take a 'second look' at the actions contemplated." *People v DeLisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993), citing *People v Coddington*, 188 Mich App 584, 599-600; 470 NW2d 478 (1991).

In this case, premeditation and deliberation may be inferred from the circumstances. About a month before the incident, Dontanyal Reed, Nathaniel Foreman, and defendant moved into the home of Janice Smith. Smith testified that defendant and Reed did not get along well and had an argument the morning in question. Defendant pointed a handgun at Reed but then walked away. Defendant accused Reed of taking and selling some boots that had \$1,000 worth of drugs in them. Reed left to go look for the boots. Defendant threatened Reed throughout the day. Defendant and Reed left the house together in the afternoon, walking toward Harding Street, and that was the last time Smith saw both of them. A customer came to the house and asked about defendant, indicating that he shot somebody.

On the afternoon in question, 13-year-old Ebony Waters was walking down Harding Street to pick her brother up from school when she saw two men in a field arguing over money. Waters testified that the men were about six feet away from her. Waters recognized the men from the neighborhood. Waters heard the man without a gun tell defendant that he was not giving him anything, and then he began to walk backwards. The two men continued to argue, and Waters saw defendant shoot the other man.

After defendant shot the other man, Waters crossed the street. Defendant crossed the street, came up behind Waters, put his arm around her, put the gun to her head and said "I won't hear anything about this, will I?" Then defendant ran up the street, jumped in a black Neon, and a lady yelled at him to come back with her car. Waters picked up her brother from school. Defendant drove by them in the black Neon, rolled down the window, and shook his head up and down at Waters. Waters had a clear view of defendant's face when she saw him in the car. Waters identified defendant at the preliminary examination and at the trial.

Based on the testimony, it was reasonable for the jury to conclude that defendant intentionally killed the victim and premeditated and deliberated the killing. There was an eyewitness to the killing, and the argument over which the killing presumably took place had been going on all day, which was more than enough time for defendant to take a second look before fatally shooting Reed. Viewing the testimony in the light most favorable to the prosecution, there was sufficient evidence of premeditation and deliberation.

Affirmed.

/s/ Jessica R. Cooper

/s/ Joel P. Hoekstra

/s/ Michael R. Smolenski